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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

SWEETWATER UNION HIGH SCHOOL  
DISTRICT,

Plaintiff and Appellant,

v.

COMMISSION ON PROFESSIONAL  
COMPETENCE,

Defendant and Respondent;

RUBEN ELIZALDE,

Real Party in Interest and Respondent.

D058832

(Super. Ct. No. 37-2010-00074677-  
CU-PT-CTL)

APPEAL from a judgment of the Superior Court of San Diego County, Jay M.  
Bloom, Judge. Affirmed.

Ruben Elizalde, a math teacher with the Sweetwater Union High School District  
(the District), appealed his notice of termination to the Commission on Professional  
Competence (the Commission). The Commission determined that there was insufficient

evidence to establish Elizalde was unfit to teach under Education Code section 44932, subdivision (a)(5). (Undesignated statutory references are to the Education Code.) The District then filed a petition for writ of mandate with the Superior Court of San Diego County seeking to set aside the Commission's decision. The court denied the petition. The District appeals, arguing there is insufficient evidence to support the trial court's findings. We affirm.

## FACTUAL AND PROCEDURAL BACKGROUND

### A. *Elizalde's Employment with the District*

Elizalde holds teaching credentials in math and social studies and an administrative credential. He has been a teacher in the District since 1987, and began teaching math at Bonita Vista High School (BVHS) in 2001. He also served as a summer school administrator for the District.

The District evaluated Elizalde's performance in 2001, 2003, 2005, and 2007. At each of these evaluations, it rated him "satisfactory" (the highest ranking) in all categories. In 2001, the evaluator noted that Elizalde "buil[t] positive relationships with his students, which allow[ed] for the maximum in teaching and learning." The evaluator in 2003, however, noted that "Elizalde [] allowed student behaviors at times to frustrate him to a point that has caused him to act unprofessional in some isolated occasions."

### B. *The Misconduct*

#### 2006-2007 School Year

Bettina Batista became the principal of BVHS in early 2006. According to one of Elizalde's students, during the 2006-2007 school year, Elizalde made statements about

Batista to the class. Those statements included blaming Batista when things went wrong, calling her a slut, and stating that she had slept her way into the position as principal. The student did not report the statements at the time because she did not think they were significant. The next year, the student told another teacher about Elizalde's comments and was later summoned to Batista's office to make a written statement about what occurred. Another student heard Elizalde say that Batista did not deserve to be the principal of BVHS. This student also wrote a statement in 2008 about Elizalde's comments.

In November 2006, Elizalde yelled at a female student because she had her cell phone out in class. When the student's brother approached Elizalde about the incident, Elizalde said, "I don't have to explain shit to you. Get the hell out of my classroom or [I'll] kick you out myself." Elizalde admitted making these statements and acknowledged that they were inappropriate. Elizalde claimed that he mistakenly used that language out of frustration.

Events in 2008 and 2009

In October 2008, BVHS assistant principal, Fernando Delgado, advised Elizalde that he would evaluate him that year. Elizalde informed Delgado that it was not time for his evaluation because he was promised a five-year evaluation plan. Delgado told Elizalde that he would think about it and check with the person who may have promised the extended plan. Later, Delgado informed Elizalde that he wanted to proceed with the normal evaluation schedule because he was unfamiliar with Elizalde's teaching style and practices. In response, Elizalde stated, "That's bullshit." There were no students present when the conversation took place.

Elizalde thought Delgado might reconsider his decision, so he sent Delgado a five-year evaluation participation form to sign. Delgado viewed this as an act of defiance and prepared a letter of reprimand. Elizalde agreed to meet with Delgado regarding the letter and arranged for Lou Russo, another BVHS teacher, to act as his union representative at the meeting. Batista, however, informed Elizalde that his request to have Russo attend the meeting was denied because Russo was not a SEA site-elected representative. Elizalde checked with the union president who informed him that Russo was an appropriate representative.

When Elizalde arrived at the meeting with Russo, Batista informed Elizalde that he could not have Russo with him and cancelled the meeting. Elizalde was upset about the cancellation, and Batista described the situation as "extremely tense." According to Batista, a student overheard or witnessed her exchange with Elizalde. Elizalde continued his efforts to have Russo at the meeting and advised Batista that another teacher had offered to cover Russo's class during the meeting. Batista responded that Russo could not attend the meeting because she did not consent to the class coverage.

On one occasion, Elizalde approached an administrative assistant about Russo's class coverage. According to the administrative assistant, Elizalde yelled at her and she was embarrassed because there were other people around, including two secretaries and a student aide.

In January 2009, Batista sent Elizalde an e-mail about Elizalde's negative reaction to his second semester teaching assignment and asked to meet with him. Elizalde responded by stating, "[N]othing to meet about. thanks." Batista then informed Elizalde

that some of his colleagues were troubled by his behavior and offered to take his assignment to "keep the peace." Elizalde thought his response was respectful and not defiant. Batista, however, characterized the response as dismissive.

The next day, Batista went to Elizalde's classroom to discuss his teaching assignment. She waited at the door while students were leaving. Elizalde noticed Batista standing at the door and walked past her to leave the classroom. Elizalde and Batista had differing characterizations of the events that occurred after Elizalde left the classroom, but in general, a confrontation ensued and Elizalde grabbed the arm of an assistant walking by to be a witness.

According to Batista, she directed Elizalde to go back into the classroom and he complied. However, Elizalde darted back out, grabbed the door and shut it. The door hit Batista's arm and she accused Elizalde of hitting her with it. Elizalde denied closing or slamming the door on Batista, and stated that he did not see it hit her.

### *C. Notice of Dismissal*

In January 2009, the District placed Elizalde on administrative leave and informed him that he was not allowed to enter any District facility without prior approval. In April, the District served Elizalde with a notice of its intention to dismiss him as an employee and statement of charges, alleging evident unfitness for service under section 44932, subdivision (a)(5).

### *D. The Hearing and Commission's Decision*

Elizalde requested a hearing before the Commission to contest the dismissal charges. The Commission held an evidentiary hearing on the matter before a three-person

panel. The District and Elizalde each had the opportunity to call witnesses and to present documentary evidence. The Commission issued its decision in December 2009, unanimously finding that cause did not exist to dismiss Elizalde from his teaching position.

In reaching its decision, the Commission expressed its concern, stating: "The Commission was very troubled by [Elizalde's] conduct. The statements he made to and in the presence of students were highly inappropriate and reflected extremely poor judgment. His attitude toward school administration, and in particular Batista, was defiant and disrespectful. Overall, his behavior was repeatedly unprofessional and reflected a significant anger management problem. . . . However, the evidence as a whole, including all of the matters just noted, was insufficient to establish [Elizalde's] unfitness to teach." The Commission also noted that Elizalde's "misconduct, in terms of extent, severity, and recency, primarily involved his relationship with school administration, and did not in a serious way adversely affect students."

*E. The District's Petition for Writ of Mandate*

The District filed a petition for writ of mandate challenging the Commission's decision. The District alleged the Commission abused its discretion and that the weight of the evidence did not support a dismissal of the charges against Elizalde. Elizalde opposed the petition as the real party in interest.

The trial court upheld the Commission's decision, concluding that "the record show[ed] two incidents involving students that occurred two years ago, that were addressed and that ha[d] not been repeated. In October 2008 and January 2009, Elizalde

and the school administrators had several difficult encounters. There are different explanations for the conduct. The court is mindful that the record shows Elizalde ha[d] been disrespectful towards administrators and at times [] conducted himself in an unprofessional manner. Nonetheless, while the court takes a dim view of Elizalde's conduct, the evidence presented [was] insufficient . . . to conclude that he [was] evidently unfit for service, which requires more than a showing of unprofessional conduct."

## DISCUSSION

### I. *Standard of Review*

A trial court reviewing the decision of an administrative agency exercises its independent judgment in reviewing the evidence and that an "abuse of discretion is established if the court determines that the findings are not supported by the weight of the evidence." (Code Civ. Proc., § 1094.5, subd. (c).) Under the independent review standard, the trial court may weigh the credibility of witnesses. (*Pittsburg Unified School Dist. v. Commission on Professional Competence* (1983) 146 Cal.App.3d 964, 977 (*Pittsburg*).

"After the superior court makes an independent judgment upon the record of an administrative proceeding [the] scope of review on appeal is limited." (*San Dieguito Union High School Dist. v. Commission on Professional Competence* (1985) 174 Cal.App.3d 1176, 1180.) We must sustain the trial court's findings if they are supported by substantial evidence. (*Pittsburg, supra*, 146 Cal.App.3d at p. 978.) In reviewing the evidence, we resolve all conflicts in favor of the party prevailing at the trial court level and must give that party the benefit of every reasonable inference in support of the

judgment. "When more than one inference can be reasonably deduced from the facts, the appellate court cannot substitute its deductions for those of the superior court."

(*Governing Board v. Haar* (1994) 28 Cal.App.4th 369, 378.) Our inquiry "begins and ends with the determination as to whether there is substantial evidence, contradicted or uncontradicted, which will support the finding of fact." (*Perez v. Commission on Professional Competence* (1983) 149 Cal.App.3d 1167, 1176.)

## II. *Evident Unfitness for Service*

The District asserts the trial court's conclusion that the evidence did not establish Elizalde was evidently unfit for service must be reversed because it was not supported by the record. We disagree.

### A. *Legal Principles*

Section 44932, subdivision (a)(5), provides that a permanent employee of a public school district may be dismissed for evident unfitness for service. In the context of a teacher, "'evident unfitness for service' . . . means 'clearly not fit, not adapted to or unsuitable for teaching, ordinarily by reason of temperamental defects or inadequacies.' Unlike 'unprofessional conduct,' 'evident unfitness for service' connotes a fixed character trait, presumably not remediable merely on receipt of notice that one's conduct fails to meet the expectations of the employing school district." (*Woodland Joint Unified School Dist. v. Commission on Professional Competence* (1992) 2 Cal.App.4th 1429, 1444, fn. omitted (*Woodland*).

In *Morrison v. State Board of Education* (1969) 1 Cal.3d 214 (*Morrison*), our Supreme Court articulated factors relevant to a determination of a teacher's unfitness to

teach as follows: (1) "the likelihood that the conduct may have adversely affected students or fellow teachers [and] the degree of such adversity anticipated," (2) "the proximity or remoteness in time of the conduct," (3) "the type of teaching certificate held by the party involved," (4) "the extenuating or aggravating circumstances, if any, surrounding the conduct," (5) "the praiseworthiness or blameworthiness of the motives resulting in the conduct," (6) "the likelihood of the recurrence of the questioned conduct," and (7) "the extent to which disciplinary action may inflict an adverse impact or chilling effect upon the constitutional rights of the teacher involved or other teachers." (*Id.* at p. 229, fns. omitted.) "These factors are relevant to the extent that they assist the board in determining whether the teacher's fitness to teach, i.e., in determining whether the teacher's future classroom performance and overall impact on his students are likely to meet the [school district's] standards." (*Id.* at pp. 229-230.)

*B. Application of Morrison Factors*

1. Adverse Affect on Students, Teachers and Administrators

In regard to the impact of Elizalde's conduct on students and teachers, the trial court determined that while the incidents in 2006 and 2007 involved students, they were resolved and there was no showing that the conduct persisted beyond the 2007 school year. The trial court also found that there was "an insufficient showing to conclude that students or teachers had been adversely affected" by Elizalde's conduct in 2008 and 2009.

The District argues that both the Commission and the trial court erred in focusing on the impact of Elizalde's behavior on students, rather than on BVHS staff and administrators. Even assuming that we should consider the impact of Elizalde's conduct

on staff and administrators, substantial evidence supports the trial court's conclusion that although Elizalde conducted himself in an unprofessional manner, his conduct did not render him unfit for service. The incidents in 2008 and 2009 showed clear lack of respect for Batista and Delgado, but there was no evidence indicating that the conduct had an adverse affect such that it impacted Elizalde's or any other teacher's or administrator's classroom performance and overall ability to teach students. (*Morrison, supra*, 1 Cal.3d at pp. 229-230 [stating *Morrison* factors are relevant to the extent they assist in determining the affect on the teacher's future classroom performance and overall impact on students].) Likewise, although we agree with the District that Elizalde's conduct negatively impacted his relationship with Batista, this impairment is not sufficient to deem Elizalde unfit for service.

Relying on *San Diego Unified School Dist. v. Commission on Professional Competence* (2011) 194 Cal.App.4th 1454, 1463 (*San Diego Unified*), the District also asserts that Elizalde's conduct had a substantial impact on students because Elizalde was a poor role model. Contrary to the District's suggestion, Elizalde's conduct is not akin to the teacher in *San Diego Unified*. In that case, the teacher posted an ad on a website soliciting sex. (*Id.* at p. 1458.) The ad contained obscene text and photographs of the teacher that were viewed by a parent and an educator. (*Ibid.*) Here, although Elizalde may have made inappropriate statements about Batista to his students, his conduct did not rise to the level of obscenity of the teacher in *San Diego Unified*. More importantly, however, there was no evidence that Elizalde's inappropriate statements to students persisted after 2007. (See *post*, Part II.B.2.)

## 2. Proximity or Remoteness in Time of the Conduct

The next factor we must consider is the proximity or remoteness in time of Elizalde's conduct to the charges against him. The District characterizes Elizalde's conduct as an ongoing pattern of misconduct from 2003 to 2009. We do not agree with this characterization. As the trial court noted, the incidents directly involving students occurred in 2006 and 2007 and there was no showing that Elizalde made any further inappropriate statements to students after 2007, which was two years before any charges were filed against him. More than a year later, Elizalde exhibited unprofessional and disrespectful behavior with administrators. However, as we have already discussed, that behavior did not have an adverse affect on students or teachers. As such, this factor does not weigh in favor of the District.

## 3. Type of Teaching Certificate Held by Teacher

Elizalde holds teaching credentials in math and social studies and an administrative credential. Neither the trial court nor the Commission made a finding concerning this factor and we find nothing in the record demonstrating that Elizalde's behavior was inconsistent with his ability to teach students in accordance with his credentials.

## 4. Extenuating or Aggravating Circumstances Surrounding the Conduct

As the trial court noted, "[t]here [was] evidence Elizalde and administrators disagreed and/or had different interpretations as to his rights under the collective bargaining agreement regarding his evaluation timing and right to a witness." While we do not find Elizalde's highly unprofessional conduct excusable, these may be extenuating circumstances explaining his behavior. Regardless, however, even if the conduct was

unexplained, the District has not shown it was anything more than unprofessional, which is not enough to render a teacher unfit for service. (See *Woodland, supra*, 2 Cal.App.4th at pp. 1444-1445.)

5. Praiseworthiness or Blameworthiness of the Motive

The District asserts that Elizalde had a blameworthy motive of animosity toward administrators. Elizalde, on the other hand, asserts that he had a praiseworthy motive of protesting perceived violations of his right to a representative of his choosing at meetings with administrators. As with the extenuating circumstances factor, even if Elizalde had blameworthy motives for his conduct, the District has simply shown unprofessional conduct that does not rise to the level of evident unfitness for service. (See *Woodland, supra*, 2 Cal.App.4th at pp. 1444-1445.)

6. Likelihood of Recurrence of the Conduct

Concerning the likelihood of recurrence, the trial court concluded: "Elizalde made some bad choices as to statements made to students, but it appears that was addressed and has not occurred since 2007. . . . Elizalde's offensive outburst to the Vice Principal when he found out he would have an evaluation, while improper and arguably without remorse, does not necessarily show escalating verbal aggressiveness. The evidence as to the door incident is conflicting as to whether it was an accident or an intentional act of violence."

There is nothing in the record indicating that Elizalde continued his improper conduct around students after 2007 or that his behavior with administrators was escalating. Rather, viewed in the light most favorable to Elizalde, the evidence indicated that Elizalde attempted to avoid further confrontation by informing Batista that there was

nothing to talk about concerning his new teaching assignment and that the incident with the door was an accident. Thus, the evidence is insufficient to establish a likelihood of recurrence.

#### 7. Chilling Effect on Constitutional Rights of Teachers

The last *Morrison* factor is whether disciplinary action would have any adverse impact or chilling effect on the constitutional rights of teachers. Elizalde asserts that discipline would "send[] a chilling message to other [union] members not to speak-up or challenge District administrators' interpretations of their rights under the collective bargaining agreement." Other than evidence regarding Elizalde's attempts to have Russo attend meetings as his union representative, there was no other evidence presented concerning the impact of discipline on the rights of teachers. Further, neither the Commission nor the trial court made findings regarding the chilling effect on teachers. Having found that there was substantial evidence supporting the trial court's decision based on the other *Morrison* factors, we need not and do not express an opinion regarding the impact that discipline would have on the constitutional rights of teachers.

#### C. *Defect in Temperament*

If an analysis of the *Morrison* criteria indicates a teacher is unfit for service, "the next step is to determine whether the 'unfitness' is 'evident'; i.e., whether the offensive conduct is caused by a defect in temperament." (*Woodland, supra*, 2 Cal.App.4th at 1445.) Having concluded there was insufficient evidence to establish Elizalde's conduct rendered him unfit for service, we need not consider whether his conduct was caused by a defect in temperament.

D. *Conclusion*

Although we conclude there was not a sufficient showing that Elizalde was unfit to teach, we certainly do not condone his behavior. In our view, he acted in a highly unprofessional and disrespectful manner that was not productive for either him or administrators. We urge Elizalde to reconsider his behavior and to be mindful of his conduct in the future because if the conduct was more frequent or exaggerated, it could amount to unfitness to teach.

DISPOSITION

The judgment is affirmed. Respondent is entitled to costs on appeal.

McINTYRE, J.

WE CONCUR:

BENKE, Acting P. J.

IRION, J.